MENTAL HEALTH/GUARDIANSHIP TASK FORCE

Final Report of Guardianship and Alternatives Subcommittee
December 15, 2004

The Mental Health/Guardianship Task Force was formed at the direction of Honorable Barbara Rodriguez Mundell, Presiding Maricopa County Probate and Mental Health Superior Court Judge to examine issues related to patients in the mental health system in Maricopa County. The Guardianship and Alternatives Subcommittee was formed at the first meeting of the Task Force on May 26, 2004 and this subcommittee met five times between June and December of 2004 to make findings and recommendations regarding guardianship and alternatives to guardianship in the mental health system.

The Guardianship and Alternatives Subcommittee consisted of the following Judicial Officers and professionals:

Honorable Steven Holding, Mental Health Court Commissioner
Honorable Edward Bassett, Superior Court Probate Commissioner
Honorable Jane Bayham-Lesselyong, Superior Court Commissioner
Diana Clarke, Probate and Mental Health Court Administrator
Michael Hinze, Deputy County Attorney for Desert Vista
Kathryn E. McCormick, Deputy County Attorney for Public Fiduciary
Trent Buckallew, Deputy Public Defender
Josephine Jones, Deputy Public Defender
Lindy Funkhouser, Maricopa County Healthcare Mandates
Tim Miller, Bureau Chief, Arizona Department of Health Services
Charles Arnold, Mental Health Attorney
James McDougall, Mental Health Attorney
Shari Tomlinson, Deputy Maricopa County Public Fiduciary
Richard T. Vanderheiden, Maricopa County Public Fiduciary and Subcommittee Chair

Guardianship has many aspects which, when it is undertaken carefully, make it an ideal mechanism for protecting the rights of persons who are incapacitated. The enclosed report includes recommendations that go towards assisting individuals in the mental health system who are in need of services while protecting their rights of self-determination and preserving their autonomy to the greatest possible extent.

GUARDIANSHIP APPOINTMENTS FROM THE MENTAL HEALTH COURT.

Guardianship is one of several options for one found to be gravely disabled under A.R.S. §36-540. Guardianship is the most restrictive option in a statute that states, "The Court shall order the least restrictive alternative available." A.R.S. §36-540B

There appears to be no statutory authority under the Title 36 statutes for the appointment of a general or permanent guardian. Rather, the authority of the Mental Health Court is limited to ordering an investigation as to the need of a guardianship and/or a conservatorship with the investigative report to be completed within 21 days by either the Public Fiduciary, the mental health provider (ValueOptions) or other suitable person or agency. This investigation report is ordered by the Court only after a finding of grave disability of the patient. If the investigation and report indicate the need for a guardian and/or conservator, the Court shall order the appropriate person, usually the Public Fiduciary, to submit a petition to become guardian or conservator of the patient. The guardianship petition is filed in the Probate Court pursuant to the Title 14 statutes. This well thought-out statutory scheme ensures that proper procedure is followed before anyone is subjected to guardianship and is in keeping with the prohibitions in the United States and Arizona Constitutions against depriving a person of their liberty and other fundamental rights without a clear and compelling need.

While there is no statutory authority to appoint a permanent or general guardian under Title 36, there is a means to appoint a type of temporary guardian under A.R.S. §36-540H that states:

> "If, on finding that a patient is gravely disabled, the Court also finds that the patient is in need of immediate guardianship for the purpose of protection of the patient or for the purpose of carrying out alternatives to Court Ordered Treatment, the Court may appoint as a temporary guardian a suitable person or the Public Fiduciary, if there is no person qualified or willing to act in that capacity."

In the last two years, the Mental Health Court has frequently appointed the Public Fiduciary as a temporary guardian without any investigation, coupled with an order to immediately file for a permanent petition for guardianship within a certain time period. Because there are no due process requirements for the appointment of a temporary (or emergency) guardianship under Title 36, it was the consensus of this subcommittee and the Judicial Officers on the task force that the Title 14 statutes related to due process requirements of the appointment of a guardian are invoked. The minority view by at least three members of the subcommittee was that this temporary guardianship under Title 36 is separate and distinct from the Title 14 guardianship. That minority view aside, and assuming that the Title 14 statutes are invoked, it then requires that the patient be afforded all the due process requirements of A.R.S. §14-5310 for the appointment of a temporary guardian. This would include a verified petition for appointment of guardian, Court Appointed Counsel, proper notice, and the specific/actual basis justifying the emergency appointment. In ordering the emergency guardianship along with an order to file for a permanent or general guardianship in Probate Court under Title 14, the Mental Health Court is

presupposing that the putative ward needs a permanent or general guardianship. Also, requiring all of this to occur in such a compressed time period does not allow the patient/ward a reasonable period of time to receive the Court Ordered Treatment, benefit from it and demonstrate to the Court that he or she has improved to the point where no hearing, let alone guardianship, is needed. The appointment of an emergency guardian is in no way a determination that the patient is incapacitated for purposes of a long-term guardianship appointment or for any other reason. An emergency and temporary guardianship under the Title 36 proceeding should not be used as a method for paving a way to a permanent appointment. Frequently, the need for an emergency guardian is temporary and the patient's long term needs can be met by alternatives to guardianship.

One of the findings and suggestions in the subcommittee was that any temporary or emergency guardianship from the Mental Health Court should have unique findings that are case specific justifying the emergency guardian appointment. While the Public Fiduciary has frequently been appointed temporary and emergency guardian from the Mental Health Court for reasons related to medical consent, we have found that the "real emergency" has been the desire to discharge the patient from the mental health treatment facility. There are cost factors with long-term placements at the mental health treatment facilities and we need to find solutions to make a proper discharge of the patient from the mental health treatment facilities to a community placement without the need of imposing a long-term guardianship.

Recommendations:

- **Review and revise the form of order from the Mental Health Court as it relates to appointment of guardians so there are specific findings as required by statute justifying the emergency guardianship appointment.**

- **Evaluate the means to make an efficient and proper discharge of the mental health patients from the mental health treatment facilities to the community using the alternatives to guardianship described in this report.**

ALTERNATIVES TO GUARDIANSHIP

In exercising its appointment authority, the Court shall encourage the development of maximum self-reliance and independence of the incapacitated person. The Court may appoint a general or limited guardian as requested if it is satisfied by clear and convincing evidence that the person is "incapacitated" and "the appointment is necessary to provide for the demonstrated needs of the incapacitated person." A.R.S. §14-1504 (B)(2)

Arizona statutes encourage the use of alternatives to guardianship. A.R.S. §14-5303(B)(8) states as follows:

> "If a general guardianship is requested, the petition must state that other alternatives have been explored and why a limited guardianship is not appropriate. If a limited guardianship is requested the petition must also state what specific powers are requested."

The "demonstrated need" or this principle of necessity should bar appointment of a guardian if the person can manage independently or with the support of existing mental health services or other social services.

The National Probate Court Standards also fully support the exploration of alternatives to guardianship, as follows:

STANDARD 3.3.10 LESS INTRUSIVE ALTERNATIVES

a. **The Probate Court should find that no less intrusive alternatives exist before the appointment of a guardian.**
b. **The Court should always consider, and utilize, where appropriate, limited guardianships.**
c. **In the absence of governing statutes, the Court, taking into the account the wishes of the respondent, should use its inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs, functional capabilities and limitations of the respondent.**
d. **The court should maximize coordination and cooperation with social service agencies in order to find alternatives to guardianship and to support limited guardianships.**

At the Wingspan National Guardianship Symposium in December of 2001, guardianship experts consisting of judges, attorneys, guardianship service providers, doctors, mental health experts and other professionals concluded that there must be statutes that require that the guardianship petitions include a review of alternatives and a statement as to why none are appropriate.[1]

Recommendations:

- **The Probate Court should require Petitions for Guardianship expressly state that alternatives to guardianship have been explored and findings and orders should be made as required by A.R.S. §14-1503(B)(8).**

- **The Probate Court, in the screening process to encourage the appropriate use of less intrusive alternatives to guardianship, should require that the Court Investigator's Report explore alternatives to guardianship and require that the report state whether or not there are alternatives to guardianship.[2]**

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[1] **Wingspan recommendation No. 20**

[2] **National Probate Court Standard 3.3.2 Screening "The Probate Court should establish a process for screening all guardianship petitions and diverting inappropriate petitions. The screening process should encourage the use of less intrusive alternatives to formal guardianship proceedings."**

The Guardianship and Alternatives Subcommittee of the Mental Health Task Force discussed at length the following alternatives to guardianship:

A. Court ordered treatment and mental health case management.
B. Mental health power of attorney.
C. Designated Representative of Department of Health Services under Title 9, Section 21 of the Arizona Administrative Code.
D. Health Surrogate Act – A.R.S. §36-3231.

A. COURT ORDERED TREATMENT AND MENTAL HEALTH CASE MANAGEMENT

After the effects of *Arnold v. Sarn* and the exit criteria began to be implemented in approximately 1992, ComCare and later ValueOptions were contracted to be the RBHA (Regional Behavioral Health Authority) for Maricopa County. As the mental health system assumed its responsibility to provide services for these clients, it was the expectation that ComCare and later ValueOptions, in fulfilling their contract for mental health services through the Department of Health Services, would provide the case management and services necessary to ensure these clients' needs were met in the least restrictive manner. The responsibilities of RBHA, as outlined in the Arizona Administrative Code (See Appendix A), are quite extensive and require a comprehensive range of services designed to meet the individual needs of the client in the mental health system.

The mental health patient or client has a right to a continuum of care that consists of, but is not limited to, clinical mental health case management, outreach, housing and residential services, crisis intervention and resolution services, mobile crisis teams, vocational training and opportunities, day treatment, rehabilitation services, peer support, social support, recreation services, advocacy, family support services, outpatient counseling and treatment, transportation and medical evaluation and maintenance. The right to this mental health treatment for the client is based on each client's individual and unique needs and to those community services from which the client would benefit. These services are provided under conditions that support the client's personal liberty, are flexible enough to respond to changing needs and provides for basic goods and services without threat of denial or delay. Should there be the necessity of a guardian in this process, it would be the guardian's responsibility to consent for treatment and medications on behalf of the patient and to participate and be the decision maker. The guardian or Public Fiduciary is not a mental health service provider, but rather a provider of "informed consent" for services provided by the mental health system.

It must be emphasized that it is not the Public Fiduciary's or guardian's role to be a therapist, companion, a mental health provider, a jailer, a reformer, or a probation officer. The appointment of a guardian is not a cure for the mentally ill. A guardian cannot prevent decompensation for seriously or chronically ill patients. The guardian cannot prevent a client from refusing to take medications nor can a guardian physically force medications to be taken. Medical personnel have standards and ethics by which they operate and often times will not force treatment or medication against the will of their patient even if the guardian is willing to consent to such treatment and is requesting restraints or methods to enforce the treatment. In no

way can the guardian guarantee a client will not "recycle" through the Mental Health Court or the inpatient treatment system, any more than the mental health provider can.

The Maricopa County Public Fiduciary's Office has never been staffed or equipped to provide mental health case management. Indeed, by law and contract, such case management is the direct responsibility of the RHBA. There is concern about comments made in and out of Court by Judicial Officers implying that they feel the guardian should be responsible for more than providing informed consent and normal guardianship responsibility. It appears that the expectation is that the Public Fiduciary as guardian should oversee ValueOptions and the mental health treatment needs, visiting the ward on a weekly or monthly basis. This would duplicate the responsibilities of the RBHA, which has the entire case management team assigned (clinical liaisons, team leader, psychiatrist, case manager, etc. for each client under their care). Furthermore, imposing these additional service responsibilities on guardian administrators would not only require additional staff of the Public Fiduciary's Office at very low staff to ward ratios, it would require the guardian administrators to be trained to become the client's own mental health specialist. That being said, there has been an expansion of population and mental health cases in the last decade for which the Maricopa County Public Fiduciary's Office now needs additional staff positions and funding.

Recommendations:

- **Evaluate, determine and enforce the role and responsibilities of RHBA (ValueOptions) for mental health case management and the role and responsibilities of and the need for a guardian in the mental health system.**

- **To provide the Office of the Maricopa County Public Fiduciary with sufficient funding to hire additional Guardian Administrators and other support staff to meet the guardianship demand for services in the mental health system.**

- **The Court Ordered Treatment should be specific and tailored to the patient's mental health needs.**

B. MENTAL HEALTH POWER OF ATTORNEY

As of August 1999 Arizona has a statute allowing an individual to sign a Mental Health Power of Attorney appointing another to make mental health care decisions when the individual is incapable. The statutes provide specific procedures for notarization of witnesses, acceptance of the powers, etc. The person who signs the Mental Health Power of Attorney must be capable of understanding what he or she is signing and must do so voluntarily and knowingly. There does not appear to be widespread awareness of the Mental Health Power of Attorney and its use in the mental health system should be encouraged. There was also concern of lack of a central registry to keep these Mental Health Power of Attorneys so there is a record of who is subject to Power of Attorneys in the system. It has since been learned that the new advanced directive registry with the State is a readily available database for the Mental Health Power of Attorney directive.

Recommendations:

- **Promote the use of the Mental Health Power of Attorney and have standard forms available with all professionals in the mental health system.**

- **Use the Advanced Directive Registry with the State of Arizona as the available database for Mental Health Power of Attorney Directives.**

C. DESIGNATED REPRESENTATIVE OF DEPARTMENT OF HEALTH SERVICES UNDER TITLE 9 SECTION 21 OF THE ARIZONA ADMINISTRATIVE CODE.

A designated representative under Title 9, Section 21 of the Arizona Administrative Code, may provide special assistance to the seriously mentally ill. These advocates may help those in need of special assistance related to in-service planning, treatment planning and discharge planning. They help ensure that the mental health client is offered all appropriate services and help them to understand and choose among the different available services. If the mental health client cannot adequately understand the information in order to make an informed choice, the advocate will help find a designated representative or suggest that a guardian be appointed for the client.

The designated representative stands in the shoes of the client with regard to receiving notice of eligibility determinations, assessment reports, ISPs, and the right to appeal. They apply for service from the RBHA for the client, including clients in jail. They may appeal any treatment or grievance decision and represent a client throughout the appeals process, including at any Office of Administrative Hearings.

While the designated representative does not have the legal authority of the guardian, they can assist in communicating with and providing advocacy for the seriously mentally ill and in many cases avoid the need for guardianship.

Recommendation:

- **Promote the use of the DHS designated representative, especially at the mental health treatment facilities.**

D. HEALTH SURROGATE ACT A.R.S. §36-3231

The Health Surrogate Act provides that a healthcare provider shall make a reasonable effort to consult with a surrogate. The healthcare provider shall also make reasonable efforts to contact the following individuals in order of priority below who are available and willing to serve as the surrogate:

1. The patient's spouse unless the patient and spouse are legally separated.

2. An adult child of the patient. If the patient has more than one adult child, the healthcare provider shall seek the consent of a majority of the adult children who are easily available for consultation.
3. A parent of the patient.
4. If the patient is unmarried, the patient's domestic partner if no other person has assumed any financial responsibility for the patient.
5. Brother or sister of the patient.
6. A close friend of the patient. For the purposes of this paragraph "close friend" means an adult who has exhibited special care and concern for the patient, who is familiar with the patient's healthcare views and desires and is willing and able to become involved with the patient's healthcare and to act in the patient's best interests.

If the healthcare provider cannot locate any of the people listed above, then the patient's attending physician may make healthcare treatment decisions for the patient after the physician consults with and obtains the recommendations of an institutional ethics committee. If the institution does not have an ethics committee, the physician may make these decisions after consulting with a second physician who concurs with the physician's decision.

A person who makes a good faith medical decision pursuant to the Health Surrogate Act is immune from liability. A surrogate who is not the patient's agent or guardian should not make decisions to withdraw the artificial administration of food or fluid.

A surrogate may make decisions about mental healthcare treatment on behalf of a patient if the patient is found incapable.

Through the Health Surrogate Act the legislature has recognized that all persons have a fundamental right to make decisions relating to their own medical treatment and mental health treatment. Lack of decisional capacity, alone, should not prevent decisions being made on behalf of persons who lack decisional capacity and have no applicable advanced directive or medical or mental health power of attorney. The Health Surrogate Act helps prevent judicial involvement and causing unnecessary emotional distress to the individuals involved.

Discussions in the subcommittee included that the physicians at Desert Vista and the Arizona State Hospital were reluctant to use the Health Surrogate Act. The Health Surrogate Act seems to be in widespread use at all other hospitals in Arizona in connection with their ethics committees. It is recommended there be further exploration on why it is not being used at Desert Vista and the Arizona State Hospital.

Recommendations:

- **Promote the use of and educate all professionals in the mental health system on the Health Surrogate Act.**

- **Explore with the physicians and counsel for the mental health treatment facilities a broader use of the Health Surrogate Act.**

OTHER RECOMMENDATIONS:

- **Develop effective and efficient mechanisms to educate physicians, professionals and investigators in the guardianship process and to disseminate information about guardianship and alternatives to guardianship to families of individuals with mental disabilities and the social services professionals and mental health professionals.**

- **Ensure that when guardianships are ordered, they are individualized and limited to the extent required by the individual's needs.**

- **Require that all individuals or entities making assessments of guardianship for the Court have adequate knowledge and training to be performing these assessments. It is suggested, but not recommended, that those individuals providing assessments to the Court be certified fiduciaries by the Certification Unit of the Arizona Office of Courts.**

SUMMARY OF FINDINGS AND RECOMMENDATIONS

Subcommittee Findings:

1. There is insufficient information disseminated about alternatives to guardianship and available community resources.
2. Attorney, physicians, educators, and service providers would benefit from information about assessment of incapacitated and available community resources in order to ensure that individuals who need guardianship receive it and those who do not are provided appropriate alternatives.
3. The inappropriate use of guardians in the mental health system imposes unnecessary burdens on the Court system and other government and private entities and interferes with the autonomy of Maricopa County citizens. The unnecessary use of general or permanent guardianship rather than temporary or limited guardianship also interferes with the autonomy of Maricopa County citizens.
4. The failure to appoint a guardian when one is needed hinders the ability of individuals to receive appropriate services and achieve a reasonably adequate quality of life. It also imposes unnecessary costs and burdens on relatives, friends, government and private entities.
5. That temporary or emergency guardianship appointments from the Mental Health Court should have specific findings justifying the emergency appointment.
6. The physicians at the mental health treatment facilities are reluctant to use the Health Surrogate Act.

Subcommittee Recommendations:

1. Review and revise the form of order from the Mental Health Court as it relates to appointment of guardians so there are specific findings as required by statute justifying the emergency guardianship appointment.

2. Evaluate the means to make an efficient and proper discharge of the mental health patients from the mental health treatment facilities to the community using the alternatives to guardianship described in this report.

3. The Probate Court should require that Petitions for Guardianship expressly state that alternatives to guardianship have been explored and findings and orders should be made as required by A.R.S. §14-5303(B)(8).

4. The Probate Court, in the screening process to encourage the appropriate use of less intrusive alternatives to guardianship, should require that the Court Investigator's Report explore alternatives to guardianship and require that the report state whether or not there are alternatives to guardianship.

5. Evaluate, determine and enforce the role and responsibilities of RHBA (ValueOptions) for mental health case management and the role and responsibilities of and the need for a guardian in the mental health system.

6. To provide the Office of the Maricopa County Public Fiduciary with sufficient funding to hire additional Guardian Administrators and other support staff to meet the guardianship demand for services in the mental health system.

7. The Court Ordered Treatment should be specific and tailored to the patient's mental health needs.

8. Promote the use of the Mental Health Power of Attorney and have standard forms available with all professionals in the mental health system.

9. Use the Advanced Directive Registry with the State of Arizona as the available database for Mental Health Power of Attorney Directives.

10. Promote the use of the DHS designated representative, especially at the mental health treatment facilities.

11. Promote the use of and educate all professionals in the mental health system on the Health Surrogate Act.

12. Explore with the physicians and counsel for the mental health treatment facilities a broader use of the Health Surrogate Act.

13. Develop effective and efficient mechanisms to educate physicians, professionals and investigators in the guardianship process and to disseminate information about guardianship and alternatives to guardianship to families of individuals with mental disabilities and the social services professionals and mental health professionals.

14. Ensure that when guardianships are ordered, they are individualized and limited to the extent required by the individual's needs.

15. Require that all individuals or entities making assessments of guardianship for the Court have adequate knowledge and training to be performing these assessments. It is suggested, but not recommended, that those individuals providing assessments to the Court be certified fiduciaries by the Certification Unit of the Arizona Office of Courts.

Finally, it should be noted that the Guardianship and Alternatives Subcommittee has agreed to meet periodically to support implementation of the above recommendations.